IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-182

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, JERSEY CENTRAL POWER & LIGHT CO. IN OPPOSITION

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Decisions Below

The decision of the Court of Appeals is as indicated in the petition. The decision of the District Court, while officially unreported, appears at 8 Fair Employment Practice Cases 690.

Jurisdiction

The respondent does not question the chronology of events recited in the petition, nor does it question the statement of jurisdiction as set forth therein.

Question Presented

The petitioner's (Equal Employment Opportunity Commission) statement of the question is defective in two respects. The question it poses is whether layoffs, pursuant to a company-wide seniority system, which have a disparate impact upon minority employees, violate Title VII, Civil Rights Act of 1964, when that disparate impact is the direct result of the employer's post-1965 unlawfully discriminatory hiring practices? By asserting an unlawful post-1965 hiring practice under Title VII, petitioner assumes both facts and a conclusion which are not part of this record and which have not been established in any other proceeding. The second deficiency in the formulation of the issue, and one which follows from the first, is that petitioner disregards the significance to the issue of the most critical and distinctive element in this case, namely, the execution in December 1973 of a conciliation agreement by the petitioner Equal Employment Opportunity Commission (EEOC), Jersey Central Power & Light Co. (the company), and the involved unions

which completely settled any alleged past discrimination. Consequently, if the EEOC correctly stated the issue based upon the proceedings below, it would read: Whether layoffs, having a disparate impact upon minority employees, made pursuant to a collectively bargained, company-wide seniority system incorporated without change in an EEOC conciliation agreement, violate Title VII:

a) where there is no finding of post-Act discrimination; or

b) where allegations of post-Act discrimination have been settled by the conciliation agreement and any further EEOC action waived?

There are significant questions concerning estoppel and waiver in this proceeding which will have a major impact upon the litigants herein and are of great importance in the conciliation process of EEOC under the Act. Accordingly, if the court were to grant the EEOC petition, it is submitted that the following question should likewise be accepted for review.

> Did the Court of Appeals err by remanding the cause to permit evidence to be adduced by parties in the current litigation on the question of whether the company-wide seniority system was bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, in light of its holding that the seniority system of the collective bargaining agreement had been incorporated by the EEOC in the conciliation agreement?

Because the foregoing question is considered so vital to the conciliation process it has been raised by the company in a cross-petition filed herein.

Statute Involved

In addition to the provisions of Title VII of the Civil Rights Act set forth in the petition, this case also involves the following provisions of the statute, set forth in relevant part.

Section 706(b), 42 U.S.C. § 2000e-5(b):

> "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1):

> "If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge."

Counter-Statement of the Case

Petitioner's statement of the case is essentially correct with respect to those facts recited. However, it is an incomplete factual statement and inaccurately recites the holding below. Because the conciliation agreement is the distinguishing feature of this case, we first set forth its relevant particulars and then indicate the misreading of the decision below.

In January, 1972, a charge was filed by an EEOC Commissioner followed by a decision in January, 1973 wherein the EEOC concluded that there was reasonable cause

to believe the company had engaged and continued to engage in unlawful employment practices violative of Title VII. Among other indications, it specifically referred to post-Act discriminatory practices with respect to hiring and job assignments. Regarding hiring practices, the Commission relied upon statistical data similar to that set forth in its petition (at page 5) and concluded that in the absence of what it deemed an acceptable explanation by the company, race and national origin were the only identifiable factors explaining the disparity. While the charge was pending, the unions and the company, in the normal course, negotiated a new collective bargaining agreement which was executed in November, 1973 extending the very same seniority system that had existed theretofore. In December, 1973 a conciliation agreement, incorporating that company-wide seniority system, was entered into by the EEOC, the company and the involved unions providing in part as follows:

> "A charge having been filed under Title VII . . . said charge having been investigated and a decision having been rendered on the basis of the relevant facts, the parties hereby resolve and conciliate the matter as follows:
>
> *Section 1.*
>
> GENERAL PROVISIONS
>
> 1. It is understood that this Agreement does not constitute an admission by the respondents of any violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> . . .
>
> 3. *The Commission agrees not to sue the respondents over matters contained in this Agreement* subject to respondents' compliance with the

promises and representations contained herein. . . . (Emphasis added.)

4. This *waiver* by the Commission *extends to any matter which is covered by this Agreement.* . . . (Emphasis added.)

. . .

Section III.

RECRUITMENT AND HIRING PRACTICES

10. . . . The wages, benefits, other conditions of employment and seniority date of such employee [i.e., new hires] shall be determined in accordance with the provisions of the collective bargaining agreement.

. . .

Section IV.

PROMOTION AND TRANSFER

2. The respondents agree that within sixty (60) days after the signing of this Agreement, those male minority/females who are qualified and who had indicated the desire to transfer shall be given the opportunity to transfer, using their total length of Company service, subject to vacancies being available and in a manner consistent with the current collective bargaining agreement. For purposes of this Conciliation Agreement vacancies occasioned by lay off . . . shall not be considered as vacancies." (Petitioner's Appendix, pgs. 28-29, 45.)

The Court of Appeals, in determining the breadth of the conciliation agreement, concluded as follows:

"We regard the conciliation agreement as unambiguous in its requirements that an increased pro-

portion of females and minority group persons be hired, that once hired, workers in these classes be controlled by the terms and conditions of employment as set forth in the collective bargaining agreement. *Accordingly, we read the conciliation agreement as not modifying the promotion, transfer or layoff practices established by the collective bargaining agreement* . . . (Emphasis added.)

. . .

We thus interpret the conciliation agreement as being consistent with, rather than in conflict with, the collective bargaining agreement, *in that it incorporates the Company seniority system.*" (P.A. pgs. 44, 45-46. Emphasis added.)

Despite the foregoing, the EEOC, at page 7 of the petition, summarized the decision below, as follows:

"The panel unanimously held that the conciliation agreement was directed at new hires and did not cover layoffs. The two agreements, consequently, were not in conflict 'either by their express terms or by implication.' [Citation omitted].. We do not here question that holding."

The EEOC for the first time has thus abandoned its earlier contentions concerning conflict advanced in both the District and Circuit Courts below.

Clearly, the Court of Appeals found that the collective bargaining and conciliation agreements were not in conflict. But it is completely erroneous to state that the reason the court found no conflict was because the conciliation agreement related to hiring and "did not cover layoffs". The above excerpts demonstate just the opposite. The Court expressly found that the conciliation

agreement "*incorporates* the Company seniority system" without modification and it is for that reason that no conflict exists. This reading is critical to an understanding of the company's position.

ARGUMENT

A. The EEOC misreads the Title VII holding of the Court of Appeals.

The Company opposes the petition in its present form because it raises a Title VII issue which on the record below is purely hypothetical. A fair reading of the petition indicates that the EEOC is deeply concerned with what it regards as an improper construction of the Act, and in order to present that issue for review it has structured a set of "facts" from gleanings in the record which, on even the most superficial analysis, do not establish the necessary evidentiary base.

The EEOC reads the majority opinion to say that regardless of how flagrant an employer's hiring practices since the passage of the Act, Congress intended that a facially neutral company-wide seniority system should be insulated from attack even though a subsequent layoff pursuant to that seniority system would remove from the work force one whose hiring had been discriminatorily delayed and whose right to acquire seniority was to that extent denied. In short, a seniority system can be bona fide despite an unlawful hiring practice.

Contrariwise, the EEOC contends that any post-Act unlawful hiring practice infects the seniority system and *a fortiori* it cannot be bona fide. In short, both the practice and the seniority system must be remedied.

A facially neutral company-wide seniority system is a study in complete neutrality. Unlike other forms of seniority, it regulates employment rights, privileges and liabilities in a uniform manner for all those who have become employed, be they prior discriminatee or preferred white. The hiring practice is selective and may be discriminatory; the company wide seniority system has no discretion and, of itself, cannot discriminate. Unlike some departmental seniority systems or variations thereof, it has no "built-in head winds" which can on a continuing basis hamper the exercise of black employment rights while at the same time enhancing white employment rights. If there are specific employees who have in the past been subjected to hiring discrimination and who are now blindly laid off under the company-wide seniority system, they are not without remedy. But the remedy should fit the individual wrong by making whatever individual adjustments are necessary within the seniorty system. The remedy is not to discredit the entire system by declaring it to be less than bona fide and denying it any operational effect.

By analogy, the seniority system is the looking glass. If it is not distorted, it will reflect accurately what comes before it. Thus, if the seniority system is neutral and company-wide (the purest form), any employee given his rightful place will reflect equally as well as any other. Herein lies the difference in approach between the view of the court and the view of the EEOC.

If the EEOC complaint is considered in general terms, i.e., that the discriminatory hiring practice operated to the disadvantage of members of a particular class whose identities and numbers are unknown and the relief sought is neither coupled with individuals who have been wronged nor concerned with determining their identities, then, says

the court, such relief is not judicially authorized and recourse must be had to the legislative process.[1] Apparently, this latter situation is not what concerns the EEOC. It is troubled instead by the identifiable discriminatee who, never having had his wrong remedied, is again penalized by the employer's hiring practices when laid off. But as hereafter developed, that is not this case.

A second interpretation which may be reasonably placed upon the Court of Appeals decision requires recognition of the particular facts of this case. Rather than making a sweeping statement of law as characterized by the EEOC, the Court was simply reacting to the significance of the conciliation agreement. That agreement has been the centerpiece of this entire proceeding, and the court's comments must be related to it. Given proper effect, the conciliation agreement of 1973 constitutes a complete resolution and settlement of all charges relating to discriminatory employment practices, and particularly past hiring practices. The subject matter of the charges necessarily concerned only post-Act conduct. Thus, upon execution of that agreement, the company started with a fresh slate and was no longer subject to a charge by the EEOC that its hiring practices prior to the agreement were unlawfully discriminatory.[2] The EEOC could not at a later time reassert those charges for which it had negotiated a settlement, nor could the court, in search-

[1] This approach is basically the one followed by the Fifth Circuit in *Watkins* v. *United Steelworkers of America, Local 2369,* 516 F.2d 41, (1975).

[2] The court was careful to observe: "What we decide here can obviously affect and bind only the parties present in this litigation." (P.A. pg. 62.)

ing for an answer in the declaratory judgment proceeding, disregard that settlement. Thus, when it confronted the Title VII issue, it did so in the context of the conciliation agreement. In holding a facially neutral company-wide seniority system to be bona fide even though it operates to the disadvantage of females and minority groups, the court is implicitly saying that it could reach no other conclusion where the question of past practice has been foreclosed by a conciliation agreement which remedied all alleged impropriety. In short, in this context there was no past discrimination, after the passage of the Act, which the seniority system could perpetuate.

If either of the interpretations above is correct, the concern expressed by the EEOC is unfounded.

B. There has been no finding of any past discrimination.

In the presentation of its argument, the EEOC states that the statistical data on the composition of the company's work force indicates a *prima facie* case of past hiring discrimination, and further states its belief that, unlike other decided cases, this case "may present" the situation of post-Act unlawful discrimination which is perpetuated by a company-wide seniority system (Petition, pages 9, 12). As its argument progresses, these tentative statements of belief give way to outright declarations of fault. The EEOC describes two kinds of "victims of Jersey Central's post-1965 hiring discrimination": first, those "who applied to the company but were *unlawfully* rejected", and second, those "who were in the labor market and would have applied but for Jersey Central's reputation as a discriminatory employer" (Petition,

page 16. Emphasis in original). It is argued that the company-wide seniority system here "is founded on" these elements of unlawful post-1965 discrimination, and that its maintenance perpetuates such discrimination. Such a seniority system, maintains EEOC, cannot therefore be bona fide within the meaning of Section 703(h), and consequently a program of layoffs pursuant to that system having a disparate impact upon minorities is a violation of Title VII. If this were a valid thesis, it is one wholly irrelevant here. The essential predicate of unlawful post-Act hiring discrimination is absent.

There has been no finding in any forum that the company unlawfully rejected any applicant or that the company had a reputation for discrimination which thereby deterred potential applicants. There has been no finding that one or more of those employees laid off in 1974 had been discriminated against at an earlier time. Finally, there has been no finding or contention that the company-wide seniority system was adopted or maintained with an intent to discriminate or that the "differences" flowing from its operation, i.e., disparate impact, are "the result of an intention to discriminate." (Section 703(h)). The District Court expressly declined to explore the topic of discrimination prior to the conciliation agreement (Supp. App. pgs. 2-3). In the Court of Appeals, the majority opinion observed:

> "We are not concerned here with allegations or proof that the Company's plant-wide seniority system is by its express terms and intent presently discriminatory. Nor are we concerned with any charges or proofs that this plant-wide seniority system, which is facially neutral, was intended and

> designed to disguise present discriminatory practices.[52]

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[52] Other than the Company affidavits (see note 51, supra), the record is completely silent as to proof or assertions that discriminatory employment practices exist or that the seniority provisions are not bona fide."

Moreover, the court concluded that the hiring statistics contained in the company's affidavits did not establish unlawful discrimination (P.A. p. 53, n. 51).

Notwithstanding the above state of the record, the EEOC now asserts as fact post-Act, unlawful discrimination by the company. In order to make its "perpetuation" theory tenable, the EEOC *must find* some past discrimination for a "suspect" seniority system to carry forward. In earlier court decisions, this essential element was, typically, pre-Act conduct, not unlawful under Title VII, but nonetheless found or admitted to be discriminatory.[3] While at one point (Petition, page 11) the EEOC appears to contend that merely a discriminatory effect, produced by the seniority system and without business justification, is sufficient to establish a Title VII violation under the *Griggs* v. *Duke Power Co.* test,[4] a further reading clarifies that the EEOC position requires that the present objectionable effects be traceable to prior unlawful discrimination. This theory has been articulated by the EEOC in a recent decision:

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[3] E.g. *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) excluding blacks from "white" jobs; *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974) petitions for certiorari pending, Nos. 74-1064, 74-1350, a total exclusion of blacks from the relevant work force.

[4] 401 U.S. 424 (1971).

> "It is the combination of past discrimination and its reflection in the seniority system which renders the seniority system not bona fide." Decision 75-251, 10 FEP Cases 1405, n. 4 at 1408 (May 8, 1975).

For purposes of this case, the EEOC appears to concede that a company-wide seniority system does not lose its bona fide character under Sec. 703(h) if it perpetuates pre-Act discrimination, but it urges that post-Act discrimination nullifies this defense. In the instant case, the only evidence recited for alleged post-Act discrimination is the statistical analysis from 1966 forward. Yet, the EEOC acknowledges that this indicates only a "prima facie case of hiring discrimination". (Petition pages 9-10). And that prima facie claim was expressed as "reasonable cause" in the EEOC's 1973 decision against the company. However, no finding of fact or conclusion of law resulted because the entire matter was conciliated and settled. Obviously, if past discrimination is needed to obtain "its reflection in the seniority system" to render the system not bona fide, the complete settlement of such alleged past discrimination must of necessity leave the system bona fide.

The EEOC suggests that this case "may present" for the first time the opportunity to disqualify a company-wide seniority system on the basis of post-Act discrimination. It distinguishes *Watkins* v. *United Steel Workers of America, Local No. 2369,* 516 F.2d 41 (5th Cir. 1975) on the ground that the employer ceased its discriminatory exclusion of blacks upon or before the effective date of Title VII. The attempted distinction is a misreading of the case. In *Watkins,* suit was brought under 42 U.S.C. 1981, as well as Title VII. Under the former

statute, the effective date of Title VII is of no significance in determining the propriety of an employer's conduct. The court upheld the company-wide seniority system against a claim it perpetuated past discrimination in a layoff situation. Regardless of the employer's pre-1965 policy of excluding blacks from its work force, the court said, the seniority system did not perpetuate discrimination as to those blacks laid off in 1971. Hired in 1968 and 1969, under a policy which no longer excluded blacks, they had not been victimized by that earlier practice, but instead had at all times been allotted their "rightful place" within the seniority system. The pre-1965 exclusion of blacks, though not within the reach of Title VII, would be proscribed by Section 1981, but that unlawful practice did not impair the bona fides of the seniority system when it operated to layoff junior blacks who had suffered no prior discrimination. Applied to the EEOC theory in the instant case, *Watkins* holds that layoffs pursuant to a facially neutral company-wide seniority system "founded on" a prior unlawful, discriminatory hiring practice are not themselves unlawful absent a finding of prior discrimination as to those laid off. And of course, there has been no proof or finding in the instant matter that this company's past practice was unlawful or that one or more of those laid off was an earlier victim of such alleged practice. Finally, as in *Watkins,* there is no contention that the seniority system is the result of an intention to discriminate. Indeed, it would be most inconsistent for the EEOC to so urge for, as the court below found, EEOC *incorporated* that system in its conciliation agreement.

C. The EEOC is estopped from asserting that the seniority system herein is not bona fide.

The EEOC has completely abandoned its earlier contentions that the conciliation agreement has primacy over the collective bargaining agreement and that layoffs according to the company-wide seniority system are in violation of the conciliation agreement. It does not question the Court of Appeals holding on that issue (Petition, pg. 7). In fact, it has put aside all consideration of the conciliation agreement and in so doing asks this Court to do the same. As indicated earlier, the EEOC theory requires two elements: post-Act discrimination and a seniority system which carries forward discriminatory effects. The company's position is that the EEOC is foreclosed from establishing either element by the conciliation agreement.

Behind the conciliation agreement lay charges and a determination of reasonable cause that post-Act hiring discrimination had occurred. The charge and determination were based on inferences drawn from hiring statistics similar to those set forth here by the EEOC. After extensive negotiations, the company agreed to a wide-ranging affirmative action program, including a five year good-faith effort to raise the minority and female workforce up to parity as openings for new hires occurred, offers of employment to alleged discriminatees, a given hiring rate in order to arrive at the percentages set forth within the five years goals, a training program for minorities so that they could become qualified applicants for entrance into the permanent workforce; and finally the company also agreed to pay in excess of $300,000 to alleged discriminatees. In return, the EEOC agreed not to sue the company over any matter contained in the

conciliation agreement and it also agreed to incorporate a non-admissions clause on behalf of the company. The company-wide seniority system was known and understood by all throughout these negotiations and was incorporated in the conciliation agreement without change. It contines in the same form.

The parties agreed that the wages, benefits, other conditions of employment and *seniority date* for new hires would be determined in accordance with the provisions of the collective bargaining agreement (Sec. III, Par. 10 of conciliation agreement).[5] The parties also agreed that the seniority system would be relied upon as a criterion for minorities/females who were qualified and interested in transferring to a different job assignment (Sec. IV, Par. 2 of conciliation agreement).[6] The EEOC had proposed that minority and female employees be given artificial seniority for job selection and transfer purposes. It later withdrew that proposal and as a result there was no modification of the seniority system (P.A. p. 31, n. 20).

The final agreement was an acceptable resolution to the EEOC and accordingly it relinquished its statutory right to institute a civil action. 42 USC § 2000e-5(f)(1). The result of that proceeding was in perfect harmony with the Congressional scheme. A principal policy of the original Act and one continued by the 1972 amendments is the elimination through "conference, conciliation and persuasion" of alleged unlawful employment practices. 42 USC § 2000e-5(b). This policy is considered sufficiently important that failure to provide an opportunity for con-

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[5] See pg. 6, *supra*.

[6] Id.

ciliation is cause for dismissal of a subsequent suit by the EEOC.[7] Obviously, for the policy to succeed, one must be able to rely on agreements reached. As the EEOC itself observed in its brief to the Court of Appeals:

> "Notwithstanding the compromises, the essential nature of the agreement remains constant: the Commission would not exercise its authority to sue; in return, the Company and Union promised to bring their practices into compliance with Title VII, in the manner outlined in the conciliation agreement.
>
> "The resultant conciliation agreement is clearly a contract binding on the 3 parties subject to judicial enforcement . . ." (page 21)

In a remarkable about-face, the EEOC now contends that the seniority system cannot be deemed bona fide because it is founded upon and perpetuates post-Act unlawful discrimination. The practices referred to are those covered by the Commissioner's charge which the EEOC later resolved to its satisfaction and for which resolution it relinquished its right to sue. The company contends that its hiring practices were not in violation of Title VII and there is no contention that the company has failed to comply with the terms of the conciliation agreement. Whatever alleged taint that may have attached to any earlier practices has been legally absolved and, assuming continued compliance, has been absolved with finality so far as the EEOC is concerned. With respect to the seniority system, there never was any con-

[7] *EEOC* v. *Westvaco Corp.*, 372 F.Supp. 985 (D.C. Md. 1974); *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974).

tention and there is none now that this system, viewed in isolation, is bad. Operating like a computer, the system simply accepts what it is fed and produces a programmed result. The vice, if any, arises from its application to victims of unlawful discriminatory practices of the past. The past practice aspect, here foreclosed, is indispensible to the notion that the seniority system perpetuates past discrimination. Patently, standing alone, the seniority system is bona fide. And more important, this particular seniority system has already passed the scrutiny of the EEOC, is specifically relied upon by the EEOC and other parties to the agreement in determining the transfer rights of employees thought to have been previously disadvantaged, and, concludes the Court of Appeals, has been incorporated without modification into the conciliation agreement.

Having agreed that the seniority date for all new hires would be determined in accord with the provisions of the collective bargaining agreement, the EEOC now contends that layoffs of those recently hired employees, dictated by their seniority dates, violates Title VII. Having agreed that the seniority system had sufficient virtue to identify opportunities for transfer, the EEOC now contends that the same seniority system is not bona fide when it identifies employees for layoff. Having remedied the hiring practice to its satisfaction, including monetary payments to a number of alleged discriminatees, the EEOC in effect now contends that it is not satisfied and ignores that remedy in order to advance the former practice as discriminatory and thus fatal to the seniority system. The company here insists upon compliance with the EEOC waiver which EEOC agreed "extends to any matter which is covered by this Agreement". (Section I, Paragraph 4 of the conciliation agreement.)[8]

[8] See pg. 6, *supra*.

The law is clearly against the EEOC efforts here. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court's comments on the question of waiver by an individual of his Title VII rights clearly anticipate and preclude the EEOC attempt here.[9] Decisions to the same effect are *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir., 1975); *U.S.* v. *Allegheny-Ludlum Industries*, —— F.2d —— (5th Cir. No. 74-3056, August 18, 1975), 11 FEP Cases 167, 174-175; *Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201, 1203-04 (2d Cir. 1972), cert denied 411 U.S. 931; *Manning* v. *General Motors Corp.*, —— F.Supp. ——, 3 FEP Cases 968, 969-971 (N.D. Ohio 1971). Most appropriate here is a brief reference to an EEOC decision:

> "The purpose of a conciliation agreement is to settle the issues the parties raised at that time . . . In the context of a compromise and settlement, 'full satisfaction of all claims' refers to prior controversies on which the compromise arises." (Decision 74-119, April 26, 1974, 8FEP Cases 701).

Once EEOC is estopped from attacking this seniority system, there is no cause of action arising from the 1974 layoffs even though a disparate impact on minorities occurred.

D. The EEOC is estopped from attacking the bona fides of the seniority system herein.

The very same reasons that preclude the EEOC from asserting that the company's seniority system is not bona

[9] 415 U.S. at ——, 94 S. Ct. at 1021, n. 15.

fide also operate to estop it from attacking that system's bona fides before the District Court under the color of a remand from the Court of Appeals. That court ordered a remand for further proceedings, as may be required, consistent with its opinion. The EEOC construes that remand to mean it is entitled to an evidentiary hearing to examine into the bona fides of the seniority system, i.e., was it adopted with a design or intent to discriminate. However, if the court indeed meant that, it clearly committed error because this ignores the principles of estopped and waiver.

A complete exposition of the company's reasons on this point is set forth in its cross-petition which argument we ask be incorporated herein by reference.

Such a permissible course, i.e., further attack upon settled matters by the EEOC in the District Court would totally undermine the conciliation process. Because it is of such importance to the meaning and effect of that process, the company has raised this issue in its cross-petion filed herein.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition of EEOC be denied. In the event the petition is granted, we respectfully request that the error commited by the court below by remanding the cause for an evidentiary hearing likewise be reviewed.

Respectfully submitted,

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